No. 12,348

IN THE

United States Court of Appeals

For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),
Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, INC., and CHARLES SLATER,
Appellees.

APPELLANT'S REPLY BRIEF.

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This brief is submitted as a reply to the briefs filed by appellee United States Smelting Refining and Mining Company, and appellee Charles Slater.

As I understand the briefs of appellees they concede that all of the points made in our opening brief are correct, excepting that they believe that the 1947 amendment (A.C.L.A. 16-1-22 last paragraph) cannot be considered to create a presumption in aid of determining a majority for want of inclusion of the word "all", so that the statute would read,

> "Those owners of land * * * who have filed a statement of their ownership * * * shall be presumed to

be *all* the owners of substantial property interest * * *"

and they concede that if the word "all" was in the statute the ruling of the lower Court was error. (U.S.S.R.&M. Br. 9 and 15.)

It would therefore appear that the only issue is whether the amendment creates a presumption as to the *census of owners* in the area. We fail to see how the inclusion of the word "all" can add to the clear language of the statute creating just that effect. Certainly, *"Those persons * * * shall be presumed to be the persons * * *"* is as clear an expression as written language will permit. Appellees will have the Court believe that the statute is limited to creating a presumption only that a particular registrant is an owner, If such had been the sole purpose of the legislature the statute would have been written, "Each person * * * who shall have filed a statement * * * shall be presumed to be an owner * * *."

Under the language of the statute a "census" presumption is inescapable. If "Those persons * * * who have filed * * * shall be presumed to be the owners * * * in the absence of a clear showing to the contrary * * *" (and it is admitted that such a registration creates a presumption as to *each registrant*), how can we escape the fact that the total registration is *just as effective* in creating a presumption as to the census of all owners?

To contend that the statute places a mandatory burden on appellant to prove the total, or census of all

owners, or suffer a failure of proof, is to beg the question. The issue is *majority*. The census figure, so that it shows a majority, is the subject in contention, ascertainable only from the Court's final decision. All the amendment does is shift the burden of going forward.

Appellees blandly suggest the "ease" of establishing the census! They say, *Appellant could have examined the lot and block books to determine the ownership of land not covered by registration statements."* How utterly ridiculous! They well know such a record is non-existent. They also well know that there is no regulation of subdivisions, or of plats, that all such are an unintegrated miscellaneous mess of "sketches" as often as not prepared by the owner himself, with generally no reference points. That it is impossible to accurately map each separate plat without the aid of deeds as well as plats; and that the only source of *census* other than the Registration Act is the deeds themselves, all filed in chronological order of recordation and covering an area perhaps half the size of the State of Washington! They also know that the deed record is the only public record. To suggest that the escrow envelopes in banks and private law offices are accessible as *public records* is to show a naive conception of the reticence of banks and attorneys.

While we concede that a discussion of the prior annexation *case* is to note matters beyond the record in this case, and perhaps not proper; yet if comment thereon aids this Court in understanding the legislative intent of the amendment, such would appear fitting. But such comment should be fair. How is the

Court's ruling in the prior case applicable to one owner, but inapplicable to the whole?

One must most meticulously plat the entire area to determine the number of parcels subject to the possibility of different ownerships. This (under the old act) is the subject of evidence and must be determined as certainly as possible. Then one must, by last record owner search, house to house inquiry as to persons in possession, and other inquiry, determine who *owns each parcel.* The individual owners, the husband and wife owners, the co-owners, the partnership and corporate owners. And with reference to *each parcel* the proof must be assembled to the extent indicated requisite by the Court for each owner; *for how else can one count noses and prove the entire number?* Also, under the old act one must count contract purchases, lessees, and perhaps mortgagees, none of whom, except the later, bother to file their agreements. Is it any wonder that the legislature wished to render this vast uncertainty definite by reference to a record presumptively correct?

> Counsel states in his brief (U.S.S.R.&M. 9 and 10):
> "It is clear from the statement that the district court in the earlier proceeding was considering the method of proving the claims of various persons to individual parcels of land in the area sought to be annexed, *not the method of proving the total number of owners.*"

And I shall answer by asking of counsel that he evolve a method of proving the total except by establishing

the claim of each. The total is but a mechanical count —the sum of the individual claimants.

Counsel finds a significance in the repeal of the Registration Act that I am unable to understand. The petition in this case stands or falls on proof of *a majority as of the date it was filed.* The statutory presumption in aid of that petition has not been repealed. The Court's ruling at the time it was made was either right—or wrong, and if wrong must be reversed. If the legislature *removed the presumption* before a retrial, then the retrial would be had accordingly, but even that has not been done. While persons may no longer be required to register, the registrations made still exist, and it is within the province of the legislature to retain their effect on an annexation proceeding if it so desires. This is a point perhaps appellees should call to the attention of the legislature, suggesting, of course, that the *real property tax rolls* with which the legislature supplanted mere title registration, should be substituted as *prima facie* proof in an annexation proceeding, and, the appeal in this case was taken on June 15, 1949, while Chapter 106, Session Laws 1949, did not take effect until June 25, 1949.

While the Court might draw an *inference* from the fact the petition was signed by a number of persons *who had not registered their title,* thus intimating that there *may exist evidence* produceable to show the census to be greater than 207, yet upon the close of appellants case the *only actual evidence* before the

Court was that the census was 207! By what reasoning counsel deems this a failure of proof, but admits that other proof, less than 282, would be a variance is not clear.

It is respectfully submitted that the judgment of the District Court of the Territory of Alaska, Fourth Judicial Division, should be reversed.

Dated, Fairbanks, Alaska,
May 1, 1950.

Respectfully submitted,
COLLINS & CLASBY,
CHAS. J. CLASBY,
Attorneys for Appellant.

Service acknowledged by receipt of copy of Reply Brief this 27th day of April, 1950.

JULIEN A. HURLEY,

Of Counsel for Protestant United States Smelting Refining and Mining Company, and Charles Slater.